



48 CFR Parts 615 and 652

[Public Notice: 10574]

RIN 1400-AE60

Department of State Acquisition Regulation; Access to Contractor Records

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: The Department of State (DOS) is proposing an amendment to the Department of State Acquisition Regulation (DOSAR), to add a new contract clause relating to Department requests for examination of contractor records.

DATES: The Department of State will accept comments on this proposed rule until *[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]*.

ADDRESSES: You may submit comments by any of the following methods:

- E-mail: Grayad@state.gov. You must include the RIN in the subject line of your message.
- Mail (paper or CD-ROM submissions): Ms. Annette Gray, Policy Division, Office of the Procurement Executive, A/OPE, 2201 C Street, NW, Suite 3200, State Annex Number 15, Washington, DC 20520.
- Persons with access to the internet may view this interim rule and submit comments by visiting: <http://www.regulations.gov>, and searching for docket number DOS-2021-0007.

FOR FURTHER INFORMATION CONTACT: Ms. Tandra Jones, Office of the Procurement Executive, A/OPE, 1735 North Lynn Street, Room 442, Arlington VA 22209. Telephone 703-875-6643.

SUPPLEMENTARY INFORMATION: The Department proposes to add 48 CFR part 615, section 615.209-70, *Examination of Records*, and 48 CFR part 652, section 652.209-70, *Examination of Records*, to the Department of State Acquisition Regulation (DOSAR).

What is the Authority for this Proposed Rule?

Title 41 of the U.S. Code, section 4706, provides that the head of an executive agency, acting through an authorized representative, may, for the purpose of evaluating the accuracy, completeness, and currency of certified cost or pricing data required to be submitted pursuant to 41 U.S.C. chapter 35 with respect to a contract or subcontract, examine all records of the contractor or subcontractor related to:

- (A) the proposal for the contract or subcontract;
- (B) the discussions conducted on the proposal;
- (C) pricing of the contract or subcontract; or
- (D) performance of the contract or subcontract.

The Federal Acquisition Regulation (FAR), 48 CFR 15.209(b), *Solicitation provisions and contract clauses*, states (in summary) that, when contracting by negotiation, except as provided in section 15.209(b)(2),¹ the contracting officer shall insert the clause at section 52.215-2, Audit and Records-Negotiation, in solicitations and contracts except those for: (1) Acquisitions not exceeding the simplified acquisition threshold; (2) The acquisition of utility services at rates not exceeding those established to apply uniformly to the general public, plus any applicable reasonable connection charge; or (3) The acquisition of commercial items exempted under section 15.403-1.

Why is the Department Publishing This Proposed Rule?

The DOSAR implements the FAR (and therefore, the statute, 41 U.S.C. 4706) for the Department of State.² The Department has determined, after a review of the existing regulations, that further clarity is required regarding implementation of 41 U.S.C. 4706 as it relates to contracts *other than* contracts by negotiation (which, as noted, are already covered by FAR section 15.209(b)).

¹ Paragraph (b)(2) relates to contracts using funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5).

² 48 CFR 601.303.

For these reasons, the Department proposes to add section 615.209-70 to the DOSAR, requiring the contracting officer to insert a new clause, *Examination of Records* (proposed section 652.215-70), in all solicitations and contracts other than contracts by negotiation.

Regulatory Findings

Administrative Procedure Act

In accordance with the provisions of the Administrative Procedure Act, the Department is publishing this rulemaking as a proposed rule, and providing 60 days for public comment.

Regulatory Flexibility Act

The Department of State, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this proposed rule will not have a significant economic impact on small entities. This determination is based on the fact that this proposed rulemaking clarifies within the DOSAR the authority of the Department to examine contractor records, which is already provided by statute.

Unfunded Mandates Act of 1995

This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Act of 1995.

Executive Orders 12866 and 13563

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts and equity). E.O. 13563 emphasized the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Department of State does not consider this proposed rule to be an “economically significant regulatory action” under Executive Order 12866.

In addition, the Department is exempt from Executive Order 12866 except to the extent that it is promulgating regulations in conjunction with a domestic agency that are significant regulatory actions. The Department has nevertheless reviewed the regulation to ensure its consistency with the regulatory philosophy and principles set forth in the Executive Orders and finds that the benefits of this proposed rule outweigh any costs, which the Department assesses to be minimal. As noted, this proposed rule does not impose any new requirements on contractors.

Executive Order 13132

The proposed rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this proposed rulemaking will not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement.

Executive Order 13175

The Department has determined that this proposed rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this proposed rulemaking.

Paperwork Reduction Act

This proposed rule does not add or revise any information collection requirements subject to the Paperwork Reduction Act, 44 U.S.C. chapter 35.

List of Subjects in 48 CFR Parts 615 and 652

Administrative practice and procedure, Government procurement.

For the reasons stated in the preamble, the Department of State proposes to amend 48 CFR chapter 6 as follows:

PART 615—CONTRACTING BY NEGOTIATION

1. The authority citation for 48 CFR part 615 continues to read as follows:

Authority: 22 U.S.C. 2651a, 40 U.S.C. 121(c) and 48 CFR chapter 1.

2. Section 615.209-70 is added to read as follows:

615.209-70 Examination of records.

The contracting officer shall insert the clause at 652.215-70, Examination of Records, in all solicitations and contracts other than those described in Federal Acquisition Regulation 15.209(b)(1).

PART 652—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. The authority citation for 48 CFR part 652 continues to read as follows:

Authority: 22 U.S.C. 2651a, 40 U.S.C. 121(c) and 48 CFR chapter 1.

4. Section 652.215-70 is added to read as follows:

652.215-70 Examination of Records.

As prescribed in 615.209-70, insert the following clause.

EXAMINATION OF RECORDS ([ABBREVIATED MONTH AND YEAR 30 DAYS AFTER
DATE OF PUBLICATION OF FINAL RULE])

(a) With respect to matters related to this contract or a subcontract hereunder, the Department of State Office of the Inspector General, or an authorized representative, shall have upon request:

(1) Complete, prompt, and free access to all Contractor and Subcontractor files (in any format), documents, records, data, premises, and employees, except as limited by law;
and

(2) The right to interview any current Contractor and Subcontractor personnel,
individually and directly, with respect to such matters.

(b) This clause may not be construed to require the contractor or any subcontractor to create or maintain any record that the contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(c) The Contractor shall insert a clause containing all the terms of this clause, including this paragraph (c), in all subcontracts under this contract other than acquisitions described in Federal Acquisition Regulation 15.209(b)(1).

(End of clause)

Zachary A. Parker,

Director,

U.S. Department of State.

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